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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1989

JOE L. BARR, a/k/a JOSEPH L. BARR,

*Petitioner,*

—against—

UNITED PARCEL SERVICE, INC. and LOCAL 804  
OF THE INTERNATIONAL BROTHERHOOD  
OF TEAMSTERS, CHAUFFEURS,  
WAREHOUSEMEN and HELPERS  
OF AMERICA,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

**BRIEF IN OPPOSITION FOR RESPONDENT LOCAL 804  
OF THE INTERNATIONAL BROTHERHOOD  
OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN  
and HELPERS OF AMERICA**

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27 pp

### **Question Presented**

Whether the unanimous panel of the court below properly applied this Court's settled and consistent holdings in concluding that petitioner failed to present sufficient evidence to support a verdict that the Union breached its duty of fair representation, when the record revealed no evidence of arbitrary, discriminatory or bad faith Union conduct?



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**Supreme Court of the United States**

October Term, 1989

No. 89-385

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JOE L. BARR, a/k/a JOSEPH L. BARR,

*Petitioner,*

—against—

UNITED PARCEL SERVICE, INC. and LOCAL 804 OF THE  
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,  
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**BRIEF IN OPPOSITION FOR RESPONDENT LOCAL 804  
OF THE INTERNATIONAL BROTHERHOOD  
OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN  
and HELPERS OF AMERICA**

Respondent Local 804 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Local 804" or "the Union"), submits that the Petition for a Writ of Certiorari to review the February 10, 1989, decision and order of the Second Circuit should be denied.

**Counterstatement of the Case**

**A. Introduction**

This is a case involving the discharge of a single employee, Joseph Barr ("Barr"), and the relentless efforts of his

Union, Local 804, to win his reinstatement.<sup>1</sup> It is undisputed that Local 804's efforts on Barr's behalf included immediate investigation of the incident which led to the discharge, prompt interviews by three Union officials of Barr and two employees whom Barr claims were with him at the time of the incident, no fewer than four meetings with United Parcel Service ("UPS" or the "Company") management at which Union representatives forcefully argued for Barr's reinstatement, and an immediate arbitration hearing at which the Union, represented by an experienced labor attorney, vigorously contested Barr's discharge before a neutral labor arbitrator. In the end, the arbitrator sustained the discharge because he credited the version of events presented by UPS, rather than the version presented by Barr and his witnesses.<sup>2</sup>

Barr then filed an action in federal district court alleging that UPS wrongfully discharged him in violation of the collective bargaining agreement and that the Union breached its duty of fair representation in its handling of his grievance. A jury returned a verdict in Barr's favor. On appeal, a unanimous panel of the Second Circuit vacated the judgment and dismissed the complaint. The court concluded, after a detailed and painstaking review of the record, that there was insufficient evidence of a breach of Local 804's duty of fair representation for that claim to have ever gone to a jury. App. 3; 868 F.2d 36, 37.<sup>3</sup>

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<sup>1</sup> References to the Petition, its Appendix, and the Joint Appendix filed by the parties in the court of appeals are as follows: "Pet. —"; "App. —"; and "J.A. —".

<sup>2</sup> It is uncontroverted that prior to bringing this action, Barr never complained about the representation provided by the Union or its counsel. Nor did he ever question any of the Union's tactical decisions or strategic judgments. J.A. 576-79, 581, 619, 1107.

<sup>3</sup> Citations to the appellate court's opinion are to both the appendix and to the official reporter.

The appellate court found that the Union's conduct challenged by Barr, discussed at length below, amounted to no more than a series of tactical decisions by the Union in the handling of Barr's grievance. App. 15-16; 868 F.2d at 43. Observing that "each of the specifically alleged breaches may, with the benefit of hindsight, be viewed as a possible tactical error" by the Union, the court concluded that "none of them, taken either singly or collectively, are nearly sufficient to make out a prima facie case that Local 804 breached its duty fairly to represent Barr." App. 15-16; 868 F.2d at 43. In fact, the court found that all of the Union's tactical decisions were consistent with either the collective bargaining agreement between Local 804 and UPS (the "Agreement") or Local 804's own rules and procedures. App. 15-16; 868 F.2d at 43.

As the appellate court emphasized, an alleged violation by a union of its duty of fair representation must "be analyzed in the context of the provisions of the collective bargaining agreement." App. 6; 868 F.2d at 39. Here, the actions taken by the Union on Barr's behalf went well beyond those required by the Agreement.

#### **B. The Contractual Grievance Procedure**

Article 20 of the Agreement sets forth the procedures for resolving grievances that arise under it. App. 6-7; 868 F.2d at 39; J.A. 1339. Disciplinary grievances, such as that involved in this case, are initiated by the Company at a Step 1 meeting. App. 6-7; 868 F.2d at 39; J.A. 1339, 1436. Under Articles 20(2)(a) and 31, a Step 1 grievance meeting with the Company is to be held within ten days of the occurrence of any dispute. The Agreement specifically provides that shop stewards, who have direct daily experience on the shop floor, handle all Step 1 grievances, without exception, and without regard to the level of UPS manage-

ment at such meetings.<sup>4</sup> App. 6-7, 18; 868 F.2d at 39, 44; J.A. 869-70, 923-24, 930-38, 943-47, 996, 998-99, 1066, 1068. In addition, as the court of appeals recognized, Local 804's practice is not to present witnesses at Step 1 grievance meetings. App. 9, 17-18; 868 F.2d at 40, 44; J.A. 953, 1068, 1075.

Of the thousands of disputes that occur between UPS and Local 804 each year, most are resolved at Step 1. J.A. 916-17, 921, 997. In the event the grievance is not resolved at Step 1, a union business agent<sup>5</sup> is notified and, if he deems the grievance meritorious, may take it to a Step 2 meeting. App. 7; 868 F.2d at 39; J.A. 946, 957, 1072, 1339. Under the Agreement and the Union's practice, business agents handle all Step 2 grievances in their respective jurisdictions. J.A. 917, 923, 955-57, 1073. Like the Step 1 meeting, the Step 2 meeting is an informal attempt to resolve a matter short of arbitration. J.A. 918, 1072. Further, like in Step 1 meetings, the Union never calls witnesses to the Step 2 meeting, as it is the Union's policy to call witnesses only at arbitrations. App. 9, 17-18; 868 F.2d at 40, 44; J.A. 925-26, 958, 1075.

If the grievance is not resolved at Step 2, the business agent, at his discretion, may choose to submit the matter to binding arbitration. App. 7; 868 F.2d at 39; J.A. 917-18, 1074, 1339-40. Only about 50 grievances per year go to arbitration. J.A. 918.

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<sup>4</sup> Petitioner, without any basis, claims that the grievance procedure consists of a "division manager discharge meeting" and a subsequent "District Manager Post-Discharge meeting." Pet. 4-5. Not only is such terminology nowhere to be found in the collective bargaining agreement, there is no evidence in the record that grievance meetings are so classified.

<sup>5</sup> Business agents, the second level of union representation, normally represent up to 1,000 employees who work at various UPS and other employer locations. J.A. 910, 955, 1069.

**C. The Events Leading to Barr's Discharge and the Union's Efforts on His Behalf**

On March 1, 1983, Barr, according to UPS, left the UPS facility without showing the contents of a bag he was carrying to a security guard stationed at the exit. By so doing, Barr violated a UPS rule requiring all employees leaving the building with bags to reveal the contents of their bags to the security guard. App. 3-4; 868 F.2d at 37.<sup>6</sup>

Immediately upon being notified of the incident by UPS, two Union shop stewards began an investigation. App. 7; 868 F.2d at 39; J.A. 959-61, 1008-09. In addition to speaking with Barr, they contacted other employees on Barr's shift, including one who allegedly witnessed the incident, to ascertain what had occurred. App. 7-8; 868 F.2d at 39; J.A. 596, 601-02, 710-11, 735-36, 962-64. As the Second Circuit noted, Barr first "reacted with surprise and professed lack of knowledge" when queried twice by his Union representatives. App. 8; 868 F.2d at 39; J.A. 964, 965. The witness also "claimed at first to have no idea" about the incident. App. 8; 868 F.2d at 39; J.A. 962-63.

Later that night, a UPS representative informed Barr's shop steward, Al Henley, that the Company planned to call Barr to a Step 1 grievance meeting about the incident. Shop steward Henley immediately informed Barr of this and, unlike the first time he spoke to Barr, was able to elicit Barr's version of events. App. 8; 868 F.2d at 39; J.A. 603, 1013.

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<sup>6</sup> At the time of the incident, UPS maintained a rule which was posted at UPS facilities and in effect for several years, requiring that "[e]mployees exiting the building with any bags, attache cases, etc., must open them for inspection by the guard on duty." App. 3-4; 868 F.2d at 37; J.A. 813-21. The rule explicitly recognized the Company's right to discharge employees for failure to comply. App. 4, 22; 868 F.2d at 37; J.A. 821. At the time of the incident, UPS's right to enforce the rule had been confirmed by an arbitrator. App. 11-12, 27-29; 868 F.2d at 41.

Henley then questioned Barr's two witnesses about what had occurred. App. 8; 868 F.2d at 1039-40; J.A. 603, 632-34, 650, 679-81, 710-11, 740. In addition, Henley spoke with the business agent, William Pritchard, who gave him suggestions on how to handle the Step 1 meeting. App. 8-9; 868 F.2d 40; J.A. 1014-16, 1044, 1089-90.

**D. The Step 1 Meeting and the Union's Efforts on Barr's Behalf**

The Step 1 meeting took place on March 2, 1983. Barr was represented by his shop steward, Al Henley. App. 9; 868 F.2d at 40; J.A. 545, 1022-25. After the security guard and a UPS loss prevention officer described their version of the incident, Barr and Henley both described and physically demonstrated Barr's version. App. 9; 868 F.2d at 40; J.A. 187, 546, 574, 855-56, 1022-25. Henley then spoke on Barr's behalf, insisting that Barr did not violate the rule and urging UPS not to discipline him because of his convincing presentation and many years of good service to UPS. J.A. 546, 855-56, 1024-25. Henley also stated that Barr had witnesses who would corroborate his version of events. J.A. 546, 575, 613. UPS Division Manager David Donnelly discharged Barr over Henley's protests, and also denied Henley's request for a 72-hour notice of discipline. App. 9; 868 F.2d at 40; J.A. 859.<sup>7</sup>

It was Barr's opinion at the time of the Step 1 meeting that Henley "did the best he could" in representing him. J.A. 581. Moreover, it is undisputed that Barr "explained to [Donnelly] everything that happened . . . exactly the way it happened," and that Barr neither complained about Henley's representation nor questioned Henley about not bringing the witnesses. J.A. 574, 1028.

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<sup>7</sup> A 72-hour notice, set forth in the Agreement, gives the Union three days to further investigate the Company's charges before discipline is imposed. J.A. 921-22.

In the court of appeals, Barr alleged several breaches of Local 804's duty at the Step 1 meeting. He asserted that his witnesses should have been present and that the business agent, rather than the shop steward, should have represented him. Further, claiming that it was not enough for Local 804 merely to have conducted several interviews prior to the meeting, Barr argued that Local 804 did not act swiftly enough or with sufficient vigor to prepare for the meeting. App. 9-10; 868 F.2d at 40.

After reviewing the record and these claims, the court of appeals found no evidence of bad faith or arbitrariness in any of Local 804's decisions at Step 1. App. 16-17; 868 F.2d at 43-44. Noting that "[i]n hindsight, any decision a union makes in the informal yet complex process of handling its members' grievances may appear to the losing employee to have been erroneous," *id.*, the court observed that the challenged decisions, all of which were "tactical in nature," were not sufficient to state a claim against the Union. App. 17; 868 F.2d at 43.

#### **E. The Step 2 Meeting and the Union's Efforts on Barr's Behalf**

Immediately after the Step 1 meeting, Henley called Local 804 business agent Pritchard at home. App. 10; 868 F.2d at 40; J.A. 547, 1027-29, 1092. In accordance with the Union's practice, Pritchard immediately took over the case. He chose to proceed to a Step 2 meeting, which he arranged to be held March 7 with UPS District Manager Thomas Petley. App. 10; 868 F.2d at 40; J.A. 1028-29, 1092, 1095, 1096.

Present at the Step 2 meeting were business agent Pritchard, shop steward Henley, Barr, Division Manager Donnelly and District Manager Petley. At the meeting, Barr once again described his version of the March 1 incident. He told Petley everything that happened, includ-

ing the fact that two fellow employees had been present. App. 10; 868 F.2d at 40; J.A. 577, 620, 636, 833, 1100. Pritchard then spoke on Barr's behalf, urging UPS to consider Barr's long, good work record at UPS and insisting that Barr's companions were witness to the incident and could corroborate Barr's story. App. 10; 868 F.2d at 40; J.A. 621, 635-36.<sup>8</sup> Pritchard demanded that UPS reinstate Barr or, at a minimum, impose a penalty less severe than discharge. After the meeting, Pritchard again spoke to Petley and again offered to present Barr's witnesses. App. 10; 868 F.2d at 41; J.A. 1100-01. Petley, stating that he did not care how many witnesses Barr had, indicated that it was unlikely he would reinstate Barr. J.A. 1011, 1101. Shortly thereafter, he informed Pritchard that he had decided to uphold Barr's discharge. App. 10; 868 F.2d at 40; J.A. 831-33, 839, 1101.

In the appellate court, Barr's complaints about Local 804's conduct before and during the Step 2 meeting were similar to those he voiced concerning Step 1. He maintained that business agent Pritchard should have called the witnesses to the grievance meeting and that Pritchard should have met with him prior to the Step 2 meeting, in order to advance better arguments on his behalf. App. 11; 868 F.2d at 41. As it had concluded about the Union's handling of Barr's Step 1 grievance, the appellate court found that the Union's actions "indubitably [did] not rise to the level of bad faith or arbitrariness" sufficient to state a fair representation claim. App. 17; 868 F.2d at 43.

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<sup>8</sup> Pritchard also attempted to distinguish Barr's case from that of Jeffrey Jones, a former UPS employee whose discharge for violating the same security rule had been sustained by an arbitrator several months before Barr's case. App. 10; 868 F.2d at 40; J.A. 1099. Pritchard pointed out that Jones, unlike Barr, had admitted to leaving the building without opening his bag. *Id.* UPS was unmoved by Pritchard's argument. J.A. 1101.

**F. The Arbitration and the Union's Further Efforts  
on Barr's Behalf**

Immediately after Petley's decision to discharge Barr, the Union submitted the dispute to arbitration. In order to ensure that Barr's case be heard as soon as possible, since he was out of work, the Union arranged to substitute his case for an arbitration that had been previously scheduled. J.A. 1105-06.

Prior to the arbitration hearing, Pritchard reviewed the case with a Local 804 attorney, Stanley Berman, and arranged for Barr's witnesses to attend the hearing and testify. App. 11; 868 F.2d at 41; J.A. 639, 738-39, 1105-07. One of the witnesses, Harold Griffin, did not want to testify for fear of retaliation and harassment from UPS. J.A. 738-39, 1105-07. Pritchard, nonetheless, persuaded him to testify on Barr's behalf. *Id.*

Pritchard also arranged for Henley, Barr and his witnesses to meet with Berman prior to the arbitration. App. 11; 868 F.2d at 41; J.A. 551, 1107. It is undisputed that everyone told Union counsel everything they knew about the case. J.A. 579-80, 660, 705-06.

Barr, his witnesses and Pritchard all testified on Barr's behalf before the designated arbitrator, Arthur Stark. App. 11, 21-26; 868 F.2d at 41. The Union's counsel also introduced evidence of Barr's good character and reputation. App. 29 n.3; J.A. 1352 n.1. Counsel for UPS called the security guard and a loss prevention clerk who had confronted Barr outside the security station on the night of the incident. App. 11; 868 F.2d at 41; J.A. 1346-48. All witnesses were cross-examined.<sup>9</sup>

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<sup>9</sup> Barr testified at trial that he knew of no reason why the Union's counsel would do anything less than his best for him. J.A. 580-81.

In his opinion, Arbitrator Stark summarized the Union's "detailed arguments" on Barr's behalf:

(1) Barr complied with the rule as he and his co-workers testified; (2) at the very least, there was substantial doubt about what occurred; and (3) Even if Barr did not comply with the rule, discharge was too severe a penalty in light of his many years of good service, his reputation in the community and the flexibility of the rule itself . . . .

App. 29; J.A. 1352.

By opinion and award dated April 7, 1983, Arbitrator Stark sustained Barr's discharge. App. 11, 20; 868 F.2d at 41. The arbitrator credited the security guard's testimony rather than Barr's, primarily because another arbitrator had found the same guard to be credible in a similar arbitration decision handed down a few months before Barr's case. App. 12, 28-30; 868 F.2d at 41.

Barr, in the appellate court, alleged three omissions on the part of Local 804 in connection with the arbitration. First, he argued that Local 804 did not adequately prepare for the arbitration hearing. Second, he complained that Union counsel did not introduce evidence at the arbitration of a prior incident in which he had asked the security guard to use the telephone and was refused. Finally, Barr faulted Union counsel for failing to call shop steward Henley as a witness and failing to argue at the arbitration that UPS was intentionally "setting up" full-time employees with seniority so that it could discharge them and replace them with less costly part-time workers. With respect to the claim of "setting up" full-time employees, Barr alleged complicity by Local 804 in this endeavor. App. 12-14; 868 F.2d at 41-42.

The appellate court rejected the claim of inadequate preparation, finding no evidence of arbitrary or bad faith conduct. App. 16-17; 868 F.2d at 43. With respect to the Union counsel's decision not to raise certain arguments or call a particular witness, the court found that it was "reasonable" for Union counsel to have decided that certain evidence would not advance Barr's cause. App. 18; 868 F.2d at 44. The court found "not a scintilla of evidence" to support the assertion that Local 804 acted in complicity with UPS to reduce the full-time work force. Finally finding "no evidence" that Local 804's conduct at the arbitration "approached that which was faulted" in the controlling decisions of this Court, discussed below, the court of appeals vacated the judgment and dismissed the complaint. *Id.*

### **Reasons for Denying the Writ**

#### **A. As the Appellate Court's Decision Is Fully Consistent With The Opinions Of This Court, It Does Not Merit Supreme Court Review.**

Petitioner, claiming that the decision below represents a "significant departure" from the opinions handed down by this Court, Pet. 20, faults the appellate court for requiring an employee to present "direct proof of an evil motive on the part of the union" in order to state a fair representation claim. Pet. 17, 20. Petitioner completely mischaracterizes the appellate court's decision.

Relying on venerable fair representation decisions of this Court, the appellate court held that "[t]wo elements must be proven for a breach of the duty of fair representation claim: The union's conduct must, first, have been 'arbitrary, discriminatory or in bad faith,' *Vaca v. Sipes*, 386 U.S. 171, 190 (1967), and second, it must have 'seriously undermine[d] the arbitral process.' *Hines v. Anchor*

*Motor Freight, Inc.*, 424 U.S. 554, 567 (1976)." App. 16; 868 F.2d at 43.

With respect to the first element of proof—the formulation articulated by this Court in *Vaca*—the court of appeals conducted a painstaking factual analysis to determine whether there was any evidence of arbitrary or bad faith conduct sufficient to sustain the jury verdict.<sup>10</sup> Contrary to petitioner's assertion, it did not limit its inquiry to whether there was evidence of the Union's "evil motive." Pet. 17, 20. Rather, the court reviewed all of the evidence, in the light most favorable to petitioner,<sup>11</sup> and concluded that "insufficient evidence exist[ed] to support Barr's claim that Local 804 breached its duty of fair representation." App. 16; 868 F.2d at 43. The court scrutinized each of petitioner's assertions for evidence of arbitrary conduct or bad faith, and found none. App. 15-19; 868 F.2d at 43-44. Accordingly, the court had no need to resolve the second prong of the inquiry, *i.e.*, whether the Union's conduct "seriously undermine[d] the arbitral process." App. 16; 868 F.2d at 43 (quoting *Hines*, 424 U.S. at 567).

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<sup>10</sup> Prior to trial, the parties agreed that there was no evidence of discriminatory conduct and that the jury would be charged accordingly. J.A. 1179.

<sup>11</sup> Petitioner's argument that the appellate court applied an improper standard in reviewing the district court's denial of Local 804's motion for judgment notwithstanding the verdict, Pet. 21-26, should be dismissed summarily. The two-pronged test which was articulated by the Second Circuit in *Lopez v. McLean Trucking Co.*, 798 F.2d 611, 614 (2d Cir. 1986) (quoting *Mattivi v. South African Marine Corp.*, 618 F.2d 163, 168 (2d Cir. 1980)), is the precise standard the court of appeals applied in the *Barr* case. App. 19; 868 F.2d at 44. Indeed, the court held that "the evidence presented was not sufficient to support a verdict that the union failed to fulfill its duty of fair representation." App. 16; 868 F.2d at 37. The court credited all of the factual assertions advanced by Barr, but found that these assertions, as a matter of law, were insufficient to state a fair representation claim. App. 3, 15, 16-21, 868 F.2d at 37, 43-44.

In determining what constitutes arbitrary conduct, the court of appeals adhered to a decision it had handed down five years earlier, which defined arbitrary conduct as acts or omissions which are "egregious," "far short of minimum standards of fairness to the employee" and "unrelated to legitimate union interests." App. 16; 868 F.2d at 43 (quoting *NLRB v. Local 282, Int'l Bhd. of Teamsters*, 740 F.2d 141, 147 (2d Cir. 1984) (quoting *Robesky v. Qantas Empire Airways, Ltd.*, 573 F.2d 1082, 1089-90 (9th Cir. 1978))).<sup>12</sup> This standard fully comports with the contours of the duty as defined by this Court.

In the first case enunciating a union's duty to fairly represent its members, *Steele v. Louisville & Nashville Railroad*, 323 U.S. 192 (1944), this Court articulated the union's duty as the obligation "to act for and not against those whom it represents" and to refrain from "hostile discrimination." 323 U.S. at 202-03. Later, emphasizing that a "wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents," *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953), this Court described a union's duty as the responsibility "to make an honest effort to serve the interests of all [its] members, without hostility to any." 345 U.S. at 337. In the final fair representation decision prior to the seminal *Vaca* case, this Court emphasized that as long as the union acted upon "wholly relevant considerations," it did not breach its duty of fair representation. *Humphrey v. Moore*, 375 U.S. 335, 350 (1964).

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<sup>12</sup> In both *NLRB v. Local 282, International Brotherhood of Teamsters*, 740 F.2d 141 (2d Cir. 1984) and *Lopez v. McLean Trucking Co.*, 798 F.2d 611 (2d Cir. 1986), decisions applying the same standard for arbitrary conduct, the Second Circuit refused to set aside jury verdicts against unions on fair representation claims. The facts of both cases, discussed at length in the brief of Local 804 submitted in the court of appeals, stand in stark contrast to the facts of this case.

In *Vaca*, after articulating the standard which has become the cornerstone of fair representation law, this Court described a union's duty as the obligation to serve its members "without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." 386 U.S. at 177. Four years later, in *Amalgamated Association of Street, Electric Railway & Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971), this Court made clear that the duty was premised on the principle that no individual union member should suffer "invidious, hostile treatment" by his union. Emphasizing that a plaintiff must "adduce substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives," 403 U.S. at 301, this Court warned that a distinction must be maintained between "honest, mistaken conduct, on the one hand, and deliberate and severely hostile and irrational treatment, on the other." *Id.* Only the latter, this Court stressed, would be actionable. *Id.*; see also *Hines*, 424 U.S. at 570-71 (a plaintiff must demonstrate more than "mere errors in judgment").

Several fundamental principles emerge from these cases. The essence of the duty of fair representation is fairness, honesty and the absence of hostile discrimination against disfavored individuals or groups. The concept of fairness and honesty does not imply a duty to supply a particular degree of care or competence, as long as the union's decisions are not arbitrary and are based upon "relevant considerations." *Humphrey*, 375 U.S. at 350. The duty does not encompass liability for honest or mistaken conduct or errors of judgment, as these acts do not implicate the concerns of abuse of statutory power underlying *Steele* and its progeny. Finally, where an employee seeks to overturn an arbitration decision, thereby questioning the settled fed-

eral labor policy favoring the finality of arbitration awards,<sup>13</sup> there must be a showing that the grievance and arbitration process “fundamentally malfunctioned” or was “seriously undermine[d]” in order to justify setting aside the award. *Hines*, 424 U.S. at 567, 569.

The court of appeals faithfully adhered to these principles in concluding that there was insufficient evidence to support the claim that Local 804 breached its duty of fair representation. It first found that there was “not a scintilla of evidence” supporting the assertion that Local 804, acting in complicity with UPS, perfunctorily processed Barr’s grievance in order to help UPS reduce the full-time work force. App. 16; 868 F.2d at 43. The court then meticulously reviewed every act of the Union that Barr faulted and concluded that these acts “taken either singly or collectively” amounted to no more than tactical decisions concerning the handling of Barr’s grievance. App. 15; 868 F.2d at 43. In strict conformity with the standards discussed above, the court concluded that these tactical decisions did not constitute arbitrary or bad faith conduct sufficient to state a claim against the Union.

With respect to Local 804’s decision not to call the witnesses to the grievance hearings, the court found that this was consistent with the Union’s past practice, that the uncontroverted testimony showed that the witnesses’ presence would not have swayed UPS representatives and that the Union’s decision was supported by previous experience in handling such matters. App. 17-18; 868 F.2d at 44.

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<sup>13</sup> This policy was first articulated over a quarter of a century ago. See *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). It was recently reaffirmed in *United Paperworkers Industrial Union v. Misco, Inc.*, 484 U.S. 29 (1987).

Concluding that Barr proffered no evidence indicating that the decision was motivated by anything other than strategy, the court held that such strategic decisions simply are not actionable. *Id.*

The court similarly found that the decision to have the shop steward, rather than the business agent, represent Barr at the Step 1 meeting was entirely consistent with the Union's past practice and the collective bargaining agreement. App. 18; 868 F.2d at 44. As to the other alleged errors at the Step 1 and Step 2 meetings, the court concluded that "nothing at trial supported the proposition that Local 804 failed competently and fairly to represent [Barr] at each stage of the grievance procedure." *Id.*

With respect to the Union's handling of Barr's arbitration, the court held that Local 804's decisions concerning which witnesses to produce and which arguments to proffer were strategic decisions that were "reasonable" and not motivated by bad faith. App. 18; 868 F.2d at 44. The court concluded that Local 804's conduct at the arbitration did not even "approach[ ] that which was faulted in *Vaca* and *Hines*." *Id.*

In sum, the Second Circuit's opinion rested firmly on settled fair representation principles crafted by this Court over the past thirty years. The court's conclusion that good faith tactical decisions or errors in judgment are not actionable is entirely consonant with this Court's teachings. Accordingly, there is no basis for Supreme Court review.

**B. There Is No Conflict Among The Circuits Which Requires Supreme Court Review.**

Petitioner, pulling isolated quotations from numerous circuit court opinions, argues that there is "little common ground" among the circuits in the fair representation field. Pet. 17. While the circuits have indeed utilized different

wording in a myriad of fair representation settings, there is no conflict among the circuits with respect to the issue decided below. The sole issue before the court of appeals was whether "specific actions and inactions" on the part of Local 804 "taken either singly or collectively [were] . . . sufficient to make out a prima facie case that Local 804 breached its duty to fairly represent Barr." App. 15; 868 F.2d at 43. In concluding "that there was insufficient evidence to support a verdict that Local 804 breached its duty of fair representation," the appellate court applied a standard wholly consonant with the holdings of all the other circuits: whether the Union's conduct was arbitrary, discriminatory or in bad faith and, if so, whether it seriously undermined the arbitral process. App. 16; 868 F.2d at 43. See, e.g., *Landry v. The Cooper/T. Smith Stevedoring Co.*, 880 F.2d 846, 852 (5th Cir. 1989); *MacKnight v. Leonard Morse Hosp.*, 828 F.2d 48, 51 (1st Cir. 1987) (per curiam); *Griesmann v. Chemical Leaman Tank Lines, Inc.*, 776 F.2d 66, 75 (3d Cir. 1985); *Ruzicka v. General Motors Corp.*, 649 F.2d 1207, 1211-12 (6th Cir. 1981); *Miller v. Gateway Transp. Co.*, 616 F.2d 272, 275-76 (7th Cir. 1980). There is thus no divergence of opinion on the question presented below which is ripe for Supreme Court review.

Further, the cornerstone of the Second Circuit's opinion was its conclusion that an employee's *post hoc* disagreement with the tactical decisions made by his union in processing his grievance is insufficient to state a fair representation claim. App. 17, 868 F.2d at 44. There is unanimity among the circuits on this point. See, e.g., *Landry*, 880 F.2d at 853 (motion for judgment notwithstanding the verdict affirmed where evidence demonstrated "at bottom, a disagreement over tactics and disciplinary decisions"); *Castelli v. Douglas Aircraft Co.*, 752 F.2d 1480, 1483 (9th Cir. 1985) (union representative's failure to call certain

witnesses, cross-examine others, and introduce certain evidence was, at most, tactical error, and did not constitute a breach of the duty); *Baker v. Amsted Indus.*, 656 F.2d 1245, 1252 (7th Cir. 1981) (even "misconceived" litigation strategy does not violate the duty of fair representation in absence of bad faith), *cert. denied*, 456 U.S. 945 (1982); *Findley v. Jones Motor Freight*, 639 F.2d 953, 959-60 (3d Cir. 1981) (rejecting claim that union breached its duty of fair representation by failing to consult more extensively with grievant, to bring witnesses to grievance meeting and to advance certain arguments at hearing); *Ruzicka v. General Motors Corp.*, 523 F.2d 306, 316 (6th Cir. 1975) ("court should not try to determine whether, in fulfilling its duty of fair representation, a union has adopted the tactic best suited to the needs of an aggrieved employee").

Similarly, all circuits concur with the appellate court's conclusion that, as long as the decisions made by a union in handling a grievance are rational, the decisions cannot serve as the basis for a fair representation claim. *See, e.g., Poole v. Budd Co.*, 706 F.2d 181, 184 (6th Cir. 1983) (no liability because union had "rational basis" for its decision); *Robesky v. Qantas Empire Airways, Ltd.*, 573 F.2d 1082, 1089 & n.14 (9th Cir. 1978) (term "arbitrary" used to describe "irrational and unreasoned decisions"); *Tedford v. Peabody Coal Co.*, 533 F.2d 952, 957 (5th Cir. 1976) (union conduct not arbitrary if the "rational result of the consideration of those factors"); *De Arroyo v. Sindicato de Trabajadores Packinghouse*, 425 F.2d 281, 284 n.4 (1st Cir.) (there would have been no breach had union proffered any "rational basis" for its conduct), *cert. denied*, 400 U.S. 877 (1970).<sup>14</sup>

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<sup>14</sup> Recognizing the well-settled federal policy favoring the final resolution of labor disputes in the grievance and arbitration ma-

(footnote continued on following page)

Other than the conclusory statement that there is "little common ground" among the courts of appeals, Pet. 17, the only conflict petitioner actually discusses involves the purported divergence of the Seventh and Ninth Circuits from the other circuits. Petitioner, citing *Camacho v. Ritz-Carlton Water Tower*, 786 F.2d 242, 244 (7th Cir.), *cert. denied*, 477 U.S. 908 (1986), claims that in the Seventh Circuit, a union that processes a grievance in a perfunctory manner does not breach its duty absent proof of intentional misconduct. Similarly, pointing to *Moore v. Bechtel Power Corp.*, 840 F.2d 634, 636 (9th Cir. 1988), petitioner claims that the Ninth Circuit has held that, where the union is deemed to exercise its judgment, the plaintiff must prove discrimination or bad faith; proof of arbitrary union conduct is insufficient to state a fair representation claim. App. 15, 16; 868 F.2d at 43.

That the Seventh and Ninth Circuits may require a greater quantum of proof concerning perfunctory or arbitrary conduct, however, is insufficient to create a conflict among the circuits which would merit Supreme Court review *of this case*. The Second Circuit carefully considered Barr's claims that "Local 804 only perfunctorily went through the motions of contesting his discharge" and that "Local 804 acted arbitrarily" by failing to call witnesses at the grievance meetings, to prepare adequately for the grievance and arbitration meetings and to have the business agent represent him from the outset. App. 16-17; 868 F.2d

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chinery, many circuits have also stressed the importance of preserving union discretion in grievance processing by narrowly construing the duty of fair representation. *See, e.g., Parker v. Connors Steel Co.*, 855 F.2d 1510, 1520-21 (11th Cir.), *cert. denied*, 109 S. Ct. 2066 (1989); *Johnson v. United States Postal Serv.*, 756 F.2d 1461, 1465 (9th Cir. 1985); *Cox v. C.H. Masland & Sons, Inc.*, 607 F.2d 138, 145 (5th Cir. 1979); *Stevens v. Highway, City & Air Freight Drivers*, 794 F.2d 376 (8th Cir. 1986).

at 43. In considering these claims, however, the court below never even reached the question whether Local 804's alleged perfunctory or arbitrary conduct was also intentional, discriminatory or in bad faith. Indeed, because the evidence adduced at trial compelled a rejection of petitioner's allegations of arbitrary or perfunctory conduct, the court never had to consider whether proof of intentional misconduct or similar malfeasance was a necessary component of actionable conduct. *Id.*

Thus, to the extent that there is a divergence among the circuits concerning whether the perfunctory processing of a grievance is actionable absent intentional misconduct, or whether proof of arbitrary conduct is sufficient to state a claim where a union's judgment is in question, resolution of such a conflict is immaterial to the controversy at hand. Indeed, there is no circuit in which petitioner would have had the benefit of a standard more favorable than that which was applied by the court of appeals here. Thus, even were this Court to hold that the more stringent standards in the Seventh and Ninth Circuits are the appropriate ones, such a holding would be of no avail to petitioner.

As this Court stressed in *The Monrosa v. Carbon Black, Inc.*, 359 U.S. 180 (1959), in dismissing a writ of certiorari which was improvidently granted:

While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. Resolution here of the [issue in conflict among the circuits] can await a day when the issue is posed less abstractly.

359 U.S. at 184. Here, as there is no circuit in which, on the facts of this case, Barr could have prevailed, resolution

of the alleged conflict among the circuits should await another day. Accordingly, petitioner's invitation for this Court to "take this opportunity to clear up the confusion" among the circuits, Pet. 17, even assuming that such confusion exists, should be declined.

### **Conclusion**

For the foregoing reasons, Barr's petition for a writ of certiorari should be denied.

Respectfully submitted,

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